IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,
Appellants,

v.

WILEY L. BOLDEN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Were the concurrent factual findings of the courts below, that Mobile's at-large election plan is maintained for the purpose of discriminating against black voters, clearly erroneous?

2. Should the decision of the Court of Appeals be affirmed on the alternative ground--considered but not relied on by a majority of the Fifth Circuit panel--that Mobile's at-large election plan had the effect of disenfranchising black voters in violation of White v. Regester, 412 U.S. 755 (1973)?

3. Did the District Court err in adopting its own plan where the appellants refused to propose any remedial plans and where the District Court injunction expressly permits state and local officials to modify that court plan?

STATEMENT

Black citizens of Mobile, Alabama, brought this action in June, 1975, challenging the at-large system of electing members of the Mobile City Commission. Following a 6 day trial, in which 37 witnesses testified and 153 documentary exhibits were introduced, and following a half-day tour of the city by the District Judge, the trial court determined that the at-large elections were being used purposefully and invidiously to discriminate against black voters. The salient findings of fact, affirmed in all respects by the Court of Appeals are as follows:

1. The Long History Of Voting Discrimination Against Blacks in Mobile

The "Redemption" of Alabama by the Bourbon Democrats from Federal Reconstruction policies culminated with the enactment of various so-called Progressive reforms. In Alabama, the Progressive movement included disfranchisment of

blacks because they were considered a corrupting influence. The 1901 Albama Constitutional Convention was called for the primary purpose of disenfranchising blacks. The cumulative poll tax and grandfather clause were the primary devices used to accomplish this. Delegates from Mobile led the efforts to remove blacks from politics in 1901, and some of these same white Mobilians promoted the adoption of an at-large elected city commission for Mobile in 1911. Only token numbers of blacks were allowed to register and vote until passage of the Voting Rights Act of 1965. J.S., pp. 19b-20b, 29b. Alabama operated an all-white Democratic primary until well after it was outlawed by this Court in Smith v. Allright, 321 U.S. 649 (1944). A white state legislator from Mobile was chiefly responsible for the enactment of interpretation tests as a device to prevent blacks from voting after the white primary was struck down. The interpretation tests were declared unconstitutional by the federal court in Mobile. Davis v. Schnell, 81 F.Supp. 872 (S.D. Ala. 1948), aff'd, 336 U.S. 933 (1949).

In 1964, the Mobile County legislative delegation sponsored a special law to enable Mobile to change to a Mayor-Council form of government after a referendum election. A former State Senator from Mobile who participated in the law's passage testified that the local delegation chose to provide for at-large election of the proposed council, rather than single-member districts, because of racial considerations:

> Q. Why was the opposition to single-member districts so strong?
>
> A. At that time, the reason argued in the legislative delegation, very simply was this, that if you do that, then the public is going to come out and say that the Mobile Legislative Delegation has just passed a bill that would put blacks in City office. Which it would have done had the City voters adopted the Mayor-Council form of govenment.

The District Court found, as a matter of fact, that "[t]hese factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a Federal Court order." J.S., p. 30b.

2. The Present Denial Of Effective Participation In The Political Process

In the opinion of the court below, the total absence of black elected officials in Mobile was "[o]nly one indication that local political processes are not equally open [to blacks]." J.S., p. 7b. The District Judge also relied upon evidence presenting a thorough analysis of racial politics in Mobile.

Expert statisticians and political scientists analyzed most of the local elections in the city [1] and county over the past 15 years. The unsuccessful candidacies of 4 black citizens who sought school board seats, 3 blacks who ran for city commission and 2 black candidates for at-large legislative seats were thoroughly explored, as were the racial campaign tactics used to stir up white backlash and defeat several white candidates who dared to espouse some interests of the black community.

1/ The City of Mobile contains approximately two-thirds of the population of Mobile County. The District Court considered the election experiences of black candidates in county-wide races to be relevant as well as to an analysis of city politics. J.S., pp. 6b-10b, 13b, n.7.

While most white candidates actively seek black votes as well as white votes, there was uniform agreement among the experts and politicians that to be successful a candidate must be careful not to be tagged with the "bloc [black] vote," which was tantamount to the "kiss of death," according to the City's own expert political scientist. All of the witnesses (except one defendant city commissioner) agreed that it would be difficult if not possible for a black candidate to overcome the solid racially polarized voting patterns in Mobile and win an at-large election. Most of the prominent leaders and politicians in the black community testified at trial, and without exception they agreed that the futility of the effort prevented them from even considering running for the city commission under the at-large system. The District Court accepted the opinion of plaintiffs' expert political scientist that black voting strength is "basically cancelled or negated in the at-large structure in the Mobile City elections."

3. Unresponsiveness Of Elected Officials To Black Community Interests

Much of the long trial was devoted to evidence of how unfairly Mobile's all-white government has treated black citizens. The

District Court found that "[t]he at-large elected city commissioners have not been responsive to the minorities' needs." J.S., p. 11B. To support this finding, the court's opinion refers first to continuing racial discrimination by the city in employment. The court still monitors compliance with its earlier decree ordering desegregation of the Mobile Police Department. Id. Other federal court orders were required to desegregate public facilities in the City of Mobile. J.S., p. 12b. Blacks have been appointed to important governmental boards and committees in only token numbers. J.S., pp. 12B-14b. Black residential areas have suffered inequitable neglect with respect to such vital services as drainage control, paving and resurfacing streets and the placement of sidewalks. J.S., pp. 15b-171b.

Perhaps most importantly, the court found that city commissioners have been insensitive to long-standing complaints of police brutality directed against blacks and the continuing recurrence of cross burnings. In particular, the trial judge was critical of the "timid and slow reaction" of city government in investigating and disciplining seven white Mobile police

officers who actually carried out a "mock lynching" of a black suspect on a downtown street corner. It was confirmed finally that these officers placed a rope around the suspect's neck, threw it over a live oak branch, and pulled the black man to his tiptoes. The court found that the "sluggish and timid response" of elected city officials to the lynching incident "is another manifestation of the low priority given to the needs of black citizens and of the political fear of a white backlash vote when black citizens' needs are at stake." J.S., p. 19b.

ARGUMENT

1. Notwithstanding appellants' extensive discussion of the meaning and application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the decisions below rest, in the first instance, not merely on the discriminatory impact of the at-large election system, but on a finding of fact that Mobile's system of electing Commissioners is motivated by an unconstitutional desire to discriminate against blacks. J.S., pp. 12a, 30b. This case thus presents primarily an application of Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

The district court made a finding of discriminatory intent after an exhaustive analysis of the evidence presented at a six day trial. J.S., pp. 286b-31b. The court of appeals carefully scrutinized the record and concluded that the district judge's detailed findings of fact were not clearly erroneous and that they compelled a finding of discriminatory intent. J.S., p. 12a. This Court does not ordinarily "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1961). No such unusual circumstances are present here.

The record contains ample evidence to support the finding that discriminatory intent lay behind the decision of the legislature to maintain the at-large election of Commissioners in Mobile. Until 1965 blacks were largely unable to register in Mobile or elsewhere in Alabama, and racial discrimination in voting had been the announced state policy since at least 1901. The district court found, based on the direct testi-

mony of several state legislators who participated in consideration of redistricting bills for Mobile, that the legislature would not pass "any effective redistricting which would result in any benefit to black voters." J.S., p. 30b. At-large elections were found to effectively disenfranchise blacks in Mobile because of a particularly virulent hostility by white voters, who have not only voted as a bloc against any black candidate for any office in Mobile, but have also repeatedly defeated white candicates who have been notably responsive to black needs. J.S., p. 17b-10b. After detailed analysis of all the election returns, the district court considered and rejected appellants' contention at trial that, just because blacks sometimes vote for winners in elections that are not racially polarized, they wield an effective "swing vote."

Against this background of historical discrimination against black voters in Alabama, and in light of a present legislative practice of refusing to adopt redistricting measures that might result in the election of blacks, the courts below were entirely justified in concluding that the maintenance of at-large voting in

this particular case was racially motivated. Arlington Heights v. Mewtropolitan Housing Corp., supra, 429 U.S. at 266-68. The lower courts did not ignore appellants' assertion that the at-large elections have been used for over half a century because of corruption problems in 1911; they merely made a factual determination that that somewhat implausible explanation was not the actual reason for maintaining the present method of election.2/

Appellants suggest the courts below adopted a rule of law that discriminatory intent must be inferred whenever a legislature fails to adopt a districting plan it knows is favorable to blacks. J.S., pp. 7, 24-26. Appellants point to no language in either opinion adopting such a rule, and none is to be found. On the contrary, the same panel of the Fifth Circuit which affirmed a finding of discriminatory intent in this case

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2/ The decisions below express no preference for single-member districts as opposed to at-large elections from a political science standpoint. Beyond the issue of racial discrimination, political commentators disagree whether the purported greater "efficiency" of at-large elected local governments can offset their high price of political control by strong financial interests and the loss of grass-roots input. See Kendricks v. Walder, 527 F.2d 44, 51-54 (7th Cir. 1975) (Pell, J., dissenting).

held in two companion cases that such intent had not been adequately demonstrated, even though both of those cases involved the same circumstances which appellants claim mandate a finding of intent under the Fifth Circuit's decisions. Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978). Appellants argue that appellees were obligated to establish not only that maintenance of the at-large plan was motivated in part by a racially discriminatory purpose, but also that that plan would not have resulted even absent that unlawful purpose; the burden of proof as to the latter issue, however, was clearly on appellants. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 2709, n.21 (1978). The decisions below do not sound the "death knell of the Commission form of government" outside of Mobile, and even there do not forbid the retention of important aspects of the Commission system in Mobile.[3/]

3/ The appellants are free, for example, to establish a triumvirate of elected executive officials and to permit a member of the single-member district council to also run for and hold such an executive position.

Neither did the decisions below adopt a "tort" standard of intent, as claimed by appellants.J.S., pp. 7, 13. The district court did hold "that the present dilution of black Mobilians is a natural and foreseeable consequent of the at-large system imposed in 1911," and "that the evidence supports the tort standard as advocated by the plaintiffs." J.S., pp. 29b-30b. But the opinion explicitly stated: "However, this court prefers not to base its decision on this theory," J.S., p. 30b. Rather, the trial judge based his finding of purposeful discrimination on direct evidence of the legislature's racial motives. J.S., pp. 29b-31b. The court of appeals affirmed on this ground as well. J.S., p. 141.

The courts below adopted no general rule about the validity of at-large elections or the Commission form of government, but merely determined on the specific evidence before them that respondents had established discriminatory intent. Such a finding, as the disposition of the companion cases shows, does not purport to dictate the outcome of other litigation regarding the use of at-large elections or the Commission form of government, and affirmance by

this Court of that factual finding on the record in this particular case will not establish any new legal principle. Under these circumstances the Court should adhere to the "two court rule" and decline to review that factual finding.

2. Whether the diluting effect of Mobile's at-large elections was sufficient by itself to warrant relief under White v. Regester is only an alternative ground for affirming the decision below. In the court of appeals only one judge, specially concurring, found liability on that basis, and appellants do not purport to find in his one-sentence concurring opinion a substantial ground for appeal. J.S., p. 71a. The district court concluded that the at-large plan, in addition to its unconstitutional purpose, also had an unconstitutional impact. But it is not the practice of this Court to grant plenary review to decide the conrrectness of independent alternative grounds available to support otherwise proper decisions.

Appellants assert that the court of appeals adopted a number of inappropriate rules of laws, but are able to point to no language in the opinion below incorporating these alleged rules

Appellants contend, for example, that the Fifth Circuit in this case held "in effect" that the existence of racially polarized voting was of "controlling significance," yet concede that the rule actually articulated by the same panel in a companion case uses polarized voting "merely as the starting point for further constitutional analysis." J.S., p. 17. Appellants claim the court of appeals "effectively" required that electoral systems be so structured as to guarantee the election of minority candidates, J.S., pp. 6, 17, but in two companion cases the same panel declined to order the use of single-member districts which would have thus assisted minority candidates.[4/] Appellants advance a number of assertions regarding facts in this case relevent to White, urging, for example, that blacks in Mobile can participate in a meaningful way in the political process and that the all-white government there is fairly responsive to minority needs, J.S., pp. 7-8; the findings of the district court, however, were to the contrary on each of those issues, and those findings were

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4/ Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978).

not, and are not claimed to be, clearly erroneous.

The alternative ground available under White v. Regester and noted by the concurring opinion and the district court represents merely a routine application of White v. Regester as clarified by a long line of carefully considered appellate decisions.[5/] Appellants did not generally question in the court of appeals the established Fifth Circuit law in this area and did not assert that the principles of White v. Regester should not be applied to city elections. Appellants did argue below that White v. Regester had been modified by Washington v. Davis, 426 U.S. 229 (1976), and that an at-large election plan which had the effect of disen-

5/ Thomasville Branch of the N.A.A.C.P. v. Thomas County, 571 F.2d 257 (5th Cir. 1978); Kirksey v. Broad of Supervisors, 554 F.2d 139 (5th Cir.), cert. denied, ____ U.S. ____ (1977); Panior v. Iberville Parish School Bd., 536 F.2d 101 (5th Cir. 1976); Ferguson v. Winn Parish Police Jury, 528 F.2d 592 (5th Cir. 1976); Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974); Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621 (5th Cir. 1974); Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir.), cert denied 407 U.S. 925 (1972).

franchising blacks was nonetheless valid unless motivated by a discriminatory purpose; on that issue, however, appellants prevailed [6/] and they do not seek review of that aspect of the decision below.

3. The Jurisdictional Statement contains a question regarding the remedy fashioned by the district court, and the history of that issue is delineated, but the matter is not discussed at length in the body of the Jurisdictional Statement. J.S., pp. 4, 15-16.

The appropriateness of the remedy was properly analyzed by the court of appeals. J.S., pp. 15a-17a. Appellants inexplicably refused in the district court to offer any plan for the conduct of elections or the creation of single-member districts. Under that cicumstance it was the obligation "of the federal court to devise and impose a reapportionment plan." Wise v. Lipscomb, 46 U.S.L.W. 4777, 4779 (1978). Manifestly some alteration in Mobile's method of election was required to remedy the proven violation, and since the

6/ Appellants maintain that, for the reasons stated in the concurring opinion of Judge Wisdom in Nevett, the court of appeals decision was erroneous in this regard. Were probable jurisdiction noted we would so argue.

plan was ordered by the district court it was required to prefer single-member districts. Id. Appellants' recalcitrant refusal to assist in the framing of a decree forced the district court to resolve the details of a plan which it would have preferred to leave to state or local authorities; for this reason the court's decree expressly provides that state and local officials retain their authority to alter the plan adopted by the court in any respect other than the reinstitution of at-large seats. J.S.; pp. 2d-3d.

Appellants imply that the trial court abused its discretion by formulating a "strong mayor" plan (based on a synthesis of special statutes governing Birmingham and Montgomery) instead of utilizing the "weak mayor" option offered by the general Alabama law. J.S., p. 15, n.17. In fact, however, it was at the instance of appellants' counsel, who during and after trial pleaded with the court not to employ the "weak mayor" form as a remedy, that the district judge appointed a blue-ribbon panel to develop an interim "strong mayor" plan. Although the Jurisdictional Statement suggests the district

judge altered Mobile's non-partisan method of electing city official, J.S., p. 22, n.26, in fact the judge retained that practice. J.S., pp. 7d-9d. Appellants did not attack this remedy in the court of appeals, except to argue that no remedy was possible because at-large elections are an integral part of commission government. In any event, the appellants, having failed in 1976 to offer the district court any proposed remedial plan, cannot now complain in this Court about the details of the plan actually adopted.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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